

H. C. OF A.  
1916.  
~  
THE KING  
v.  
MURRAY AND  
CORMIE.  
—  
EX PARTE  
THE COM-  
MONWEALTH,

by the Secretary of the Treasury to the Supreme Court of New South Wales for a prohibition (unless the District Court Judge is *pro hac vice* an officer of the Commonwealth), or by treating the order as a nullity (see *per Mansfield C.J.* in *St. John's College v. Todington* (1) ), a course which would not contribute to the seemly and orderly government of the Commonwealth.  
For these reasons I think that the order should be made absolute.

Case directed to stand over for judgment.

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.  
Solicitor for the State of New South Wales, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

(1) 1 Burr., 158, at p. 199.

[HIGH COURT OF AUSTRALIA.]

ARTHUR THOMAS HALL . . . . . APPELLANT ;  
PETITIONER,

AND

JESSIE HALL . . . . . RESPONDENT.  
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

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~  
MELBOURNE,  
March 14.  
—  
Griffith C.J.,  
Barton, Isaacs  
and Rich JJ.

*Husband and Wife—Divorce—Desertion—Duty of husband to illegitimate child of wife—Refusal of wife to return to husband without child—Marriage Act 1915 (Vict.) (No. 2691), sec. 122.*  
If a man marries a woman believing her to be of untainted character, and after marriage discovers that she has an illegitimate child, he is not bound to receive that child into his home.

If at the time when the husband discovers that fact his wife is away from him, and on being asked to come to his home refuses to do so unless he consents to her bringing the child with her and he refuses his consent, she is guilty of desertion within the meaning of sec. 122 of the *Marriage Act* 1915 (Vict.), which provides that one of the grounds upon which a petition for dissolution of marriage may be presented is "that the respondent has without just cause or excuse wilfully deserted the petitioner and without any such cause or excuse left him or her continuously so deserted during three years and upwards."

It makes no difference if the child is unborn at the time when the husband makes the discovery that he is not the father of it and when the wife refuses to return without it.

The petitioner married a woman who at the time was pregnant, but not by him. He believed that she was pregnant by him, and married her thinking that it was his duty to do so. As he had not then a home to which to take her she returned to her own people. Some time afterwards, and before the child was born, she wrote to him confessing her fault, telling him that he was not the father of the child and asking him to forgive her. He replied that he was willing to forgive her and take her to the home which he had then made, but that he would not receive or maintain the expected child. Later, and still before the birth of the child, she absolutely refused to return to him unless he agreed to take the child into his home and bring it up. He having refused to comply with the condition, she made no reply, and did not return to him. On a petition for divorce on the ground of desertion,

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*Held*, that the petitioner had not been guilty of any wrongful act which could be regarded as reasonable cause or excuse for his wife's refusal to go to him, and that a case of desertion had been made out.

Decision of the Supreme Court of Victoria: *Hall v. Hall*, (1916) V.L.R., 576; 38 A.L.T., 44, reversed.

#### APPEAL from the Supreme Court of Victoria.

A petition was brought in the Supreme Court by Arthur Thomas Hall for the dissolution of his marriage with his wife, Jessie Hall, whom he had married on 16th July 1912, on the ground that she had without just cause or excuse wilfully deserted him and without any such cause or excuse left him continuously so deserted during three years and upwards. The petition, to which the respondent did not appear, was heard by *Cussen J.*, and was dismissed. The petitioner appealed to the Full Court, and the appeal was dismissed: *Hall v. Hall* (1).



H. C. OF A. From the decision of the Full Court the petitioner appealed to  
1917. the High Court.

HALL The material facts are stated in the judgment of *Griffith* C.J.  
v. hereunder.  
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*Woolf*, for the appellant. The effect of the correspondence is that the petitioner told his wife she must give up either the child or him, and the wife refused to go to his home without the child. The position which the husband took up he was entitled to take up, and did not constitute just cause or excuse for his wife refusing to go to him. A husband is under no obligation to receive into his home, or to support, an illegitimate child of his wife by another man. The father of the child could be compelled to support it under sec. 84 of the *Marriage Act* 1915.

[Counsel referred to *Moss v. Moss* (1); *Bishop on Divorce*, 5th ed., vol. I., p. 645, sec. 776; *Bradford v. Bradford* (2).]

There was no appearance for the respondent.

GRIFFITH C.J. Unfortunately, in this case we cannot derive any assistance from the opinion of the Judges of the Full Court, which proceeded upon a misapprehension as to the date of the events relied upon to establish desertion. The petitioner married a wife who at the time was pregnant, but not by him. He believed that she was pregnant by him, and married her, thinking it was his duty to do so. He had not then any home to which to take a wife, and the respondent returned to her own people. Some time afterwards, and before the child was born, she wrote to him confessing her fault, telling him that he was not the father of the child and asking him to forgive her. He replied that he was willing to forgive her and take her to the home which he had then made, but that he would not receive or maintain the expected child. Later, and still before the birth of the child, she again wrote to him, pointing out that under the circumstances they could never live happily together, that the matter would never be forgotten, suggesting that it would be as well for them to stay as they were and not live together at all, and stating that, as he knew, she must stick to



those who had promised to stick to her, and that that was what she intended to do, namely, stick to her own people. The petitioner wrote in reply, giving her the alternative, "You must either live with the child and be divorced from me, or live with me and be parted from the child. So make up your mind which it is to be. I don't like parting with you, but I could never father another man's child." To that letter the respondent made no reply.

Under those circumstances what inference ought to be drawn? It seems to me that the wife's refusal to go to his home was in the first instance an absolute refusal, unless he complied with the condition that the child should live with her. He replied that he could not comply with that condition. Her refusal then stood as an absolute refusal, and, if that is the right view, desertion commenced at the date of the refusal, unless it was justified by some wrongful act of the petitioner.

The point is made that it is the duty of a husband under such circumstances to receive the child into his home. Is that so? Suppose that a man marries a woman believing her to be of untainted character, and after marriage discovers that she has an illegitimate child, is he bound to receive that child into his home? I think not. And I think, further, that if at the time when the husband discovers that fact the wife is away from him, and on being asked to come to his home refuses to do so unless he consents to her bringing the child with her and he refuses his consent, she is guilty of desertion. Does it make any difference that the child is unborn at the time when he makes the discovery that he is not the father of it and when the wife refuses to return without it? On principle I cannot see any reason for the distinction. But, of course, the instincts and duties of humanity are not to be disregarded. When the child is born, the husband could not insist that the mother should desert it, but would be bound to allow some reasonable time for making arrangements for its welfare and possibly to take part in those arrangements. The attitude of the wife may, however, be such as to justify the husband in acting on her refusal as absolute. Under the circumstances of this case I think that the proper inference to be drawn from the respondent's letter, which was written about two months before the child was born, and her subsequent silence,

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is that she absolutely refused to go back to the petitioner unless he agreed to take the child into his home and bring it up. In refusing to accept that condition I think that the petitioner was not guilty of any wrongful act which can be regarded as reasonable cause or excuse for her refusal to go to him. It seems to me, therefore, that a case of desertion without reasonable cause or excuse was established, and that the petitioner is entitled to the relief he asks.

The appeal must be allowed.

BARTON J. With great reluctance I come to the same conclusion for the same reasons. The case is a very painful one.

ISAACS J. I agree.

RICH J. I agree.

*Appeal allowed. Decree nisi for dissolution of marriage.*

Solicitors for the appellant, *Connelly & Crocker*, for *Connelly, Tatchell & Dunlop*, Kerang.

B. L.